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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/533,101

03/20/2006

Nigel Hugh Sanders

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EXAMINER

KRAUSE, ANDREW E

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

01/28/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/533,101	<b>Applicant(s)</b> SANDERS ET AL.	
	<b>Examiner</b> ANDREW KRAUSE	<b>Art Unit</b> 1794	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on 07 October 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8 and 11-13 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8, 11-13 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Listing of Claims***

1. Claims 1-8 and 11-13 are pending. Claims 1 and 4 have been amended.

### ***Claim Rejections - 35 USC § 103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 1-7 are rejected under 35 USC § 103(a) as being unpatentable over Aldrich (US 4,517,205) in view of Bollinger ("Comparison of Precrystallization of Chocolate").
4. Claim 8 is rejected under 35 USC § 103(a) as being unpatentable over Aldrich (US 4,517,205) in view of Bollinger ("Comparison of Precrystallization of Chocolate") and Franke (DE 19503635).
5. Claims 11-13 are rejected under 35 USC § 103(a) as being unpatentable over Aldrich (US 4,517,205) in view of Bollinger ("Comparison of Precrystallization of Chocolate") and Cull (WO 96/39045).
6. The grounds of rejection are maintained as set forth in the prior office action.

### ***Response to Arguments***

1. Applicant's arguments filed 10/7/09 have been fully considered but they are not persuasive.

2. Applicant argues that, "Aldrich is directed to a method for preparing co-deposited, two-component hard candy having a hard candy shell portion and core portion that may be soft. Aldrich states that the core may be milk-based and mentions chocolate. However, nowhere in Aldrich are examples employing chocolate disclosed or suggested, in contrast, one example describes a shell composition that is maintained at about 290°F (143°C) and a core composition that is held at about 100°F (37°C). If one of skill in the art were to employ chocolate in place of the soft candy core, the process would not be effective. The chocolate would be heated toward 290°F, become too viscous and thus block the equipment."

3. It is first noted that the use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain." *In re Heck*, 699 F.2d 1331, 1332-33, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)). A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including nonpreferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). Clearly Aldrich suggests the use of chocolate as the core component.

4. With respect to applicants argument that the chocolate would become to viscous and thus block the equipment, no evidence is provide to support this assertion. As Aldrich discloses the use of chocolate as a potential core component, and carries out the claimed method steps of:

- a. Preparing a liquid candy composition which solidifies upon cooling, said liquid composition being a first temperature (column 4, lines 51-65);
- b. Preparing a second liquid composition which solidifies upon cooling (column 3, lines 25-40), said second liquid composition being at a second temperature which is lower than the first temperature(column 4, lines 62-66);and
- c. Co-depositing the liquid candy composition and the second liquid composition in molds (column 3, line 63 to column 4, line 5).

5. Nothing in the Aldrich reference, or evidence provided by applicant suggests that the process disclosed by Aldrich would be inoperable when carried out with chocolate. Before turning to the disclosure of Bollinger, it is additionally noted that “Where...the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes, the PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product. Whether the rejection is based on “inherency” under 35 USC 102, on “prima facie obviousness” under 35 USC 103, jointly or

alternatively, the burden of proof is the same, and its fairness is evidenced by the PTO's inability to manufacture products or to obtain and compare prior art products. See *In re Brown*, 59 CCPA 1036, 459 F.2d 531, 173 USPQ 685 (1972).” *In re Best, Bolton and Shaw* 195 USPQ 430 (CCPA 1977). Thus, it appears that the level of shear generated on the chocolate in the Aldrich depositor nozzle would be within the claimed range.

6. In response to applicant's argument that Bollinger does not apply high sheer is not being applied to increase the critical temperature of the chocolate, I, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, and then it meets the claim. With respect to the temperatures used, independent claim 1 does not specify that the mixture is at the critical temperature. Further, the primary reference, Aldrich discloses the use of a core temperature of 38 C (about 40 C). The Bollinger reference is cited to disclose the amount of shear produced by the nozzle, which results in chocolate with desirable characteristics.

7. Applicant has not substantively argued the 103(a) rejection of claims 8, 11-13. Rather, the applicant relies upon the asserted deficiencies of Aldrich and Bollinger.

*Conclusion*

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREW KRAUSE whose telephone number is (571)270-7094. The examiner can normally be reached on 7:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ANDREW KRAUSE/  
Examiner, Art Unit 1794

/KEITH HENDRICKS/  
Supervisory Patent Examiner, Art Unit 1794